(4)

Supreme Court, U.S.
FILED
OCT 29 1998
CLERK

DOCKET NO. 98-326

UNITED STATES SUPREME COURT
OCTOBER TERM 1997

WALTER J. THOMAS,
PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY,
U. S. DEPARTMENT OF STATE
RESPONDENT

PETITIONERS' OBJECTION TO THE AMICUS CURIAE BRIEF OF THE CLASS OF AFRICAN-AMERICAN FOREIGN SERVICE OFFICERS

STATEMENT OF FACTS

On October 20, 1998, Counsel Of Record for Petitioners received a facsimile message from Warren Connelly, counsel for plaintiffs in the district court and court of appeals in this matter, requesting consent to appear in this Court in the status of amicus curiae in this proceeding. Counsel for Petitioners did not consent to the amicus curiae request of Mr. Connelly.

On August 24, 1998, counsel for Petitioners had served the Petition For Certiorari upon Warren Connelly and, as attested in Exhibit A to this Objection, had served the docketing statement upon Mr. Warren Connelly and parties in this action on August 30, 1998. The record in this proceeding reflects that no waiver form has been executed by any Respondents in this action and an extension of time was requested and granted only to the Respondent Madeleine Albright.

The Brief Of Amicus Curiae received on October 26, 1998 contains no Motion For Leave to file as an amicus curiae.

8 pp

ARGUMENT

The Brief Of Amicus Curiae Lacks The Required Motion For Leave To File A Brief As Amicus Curiae[1]

Rule 37.2(a) of the Rules of this Court requires any individual or entity, seeking to file as an amicus curiae, to have the written consent of all parties. Rule 37.2(b) provides that if consent is withheld by a party, a motion for leave to file an amicus curiae brief must be made as a part of the brief at the time of filing. The Brief Of The Class Of African-American Foreign Service Officers served upon counsel for Petitioners is deficient in that it contains no motion for leave to file and consent was not granted by counsel for petitioners. The Brief Of Amicus Curiae should be rejected since it does not comply with Rule 37.2(b).

The Parties Represented By The Amicus Curiae Are Parties To This Action And Have A Direct Interest In The Outcome Of This Proceeding

Rule 12.6 of the Rules of this Court states that all parties other than the petitioners are considered respondents before this Court. In the present case, Avis E. Buchanan and Warren E. Connelly, were counsel for the plaintiffs in this action. In fact, as recently as August 11, 1998, Exhibit B attached hereto and made a part hereof, Mr. Warren E. Connelly, entered into a Consent Order on behalf of the plaintiffs to seal a report under the Consent Decree which is the subject of the

---

[1]On October 28, 1998, counsel for Petitioners was informed by Mr. Warren Connelly that a Motion was being filed by the Amicus Curiae but the Motion had not been received by counsel for Petitioners at the time of the filing of this Objection.

Petition in this case. Although, counsel for plaintiffs in this action continue to hold themselves out as representatives of the plaintiffs and the class which the plaintiffs represented in the district court, Mr. Connelly and Ms. Buchanan come before this court seeking an amicus status which is not warranted nor permitted by the rules. An amicus curiae, as defined by Black's Law Dictionary, is a person or entity with strong views or an interest in an action but not a party to the action. In the present case, Mr. Connelly and Ms. Buchanan, signatories to the Brief Of Amicus Curiae, are counsel for the plaintiffs and the class the plaintiffs represented, and continue to take action on their behalf. The amicus curiae interest which is presented to the Court in the Brief Of Amicus Curiae, p. 2 is more properly that of a respondent as set forth in Rule 12.6. The plaintiffs in this action in the district court were thirty-two named individuals, Pet. app 22a. The class has no standing before a court, except to the extent that individuals may or may not be designated class representatives on behalf of absent class members, see Fed. R. Civ. P. 23 (a)(3) and (4). As stated by the Ninth Circuit in Mandujano v. Basic Vegetable Products, Inc., 541 F. 2d. 832, 834 (9th Cir. 1975), the class is not . . ."[A] legal entity. . . ." The effort of counsel to present its interest as that of an amicus curiae is not supported by the record in this action nor the rules of this Court. The counsel listed on the Brief Of Amicus Curiae were properly served as a Respondents in this action; elected not to file a response in opposition to the

Petition For Certiorari; requested no extension of time; and make no claim at the present time that counsel are not a party to this litigation. In fact, at p. 2, Brief of Amicus Curiae, counsel states that "Amicus Curiae. . .are beneficiaries of the terms and conditions of the classwide settlement. . .," which is the subject of the Petition before this Court. As such, they have a direct interest in the outcome of this proceeding and do not meet the requirements of Rule 37 to file an amicus curiae brief. The efforts of counsel for the plaintiffs to have a dual status in this action is contrary to law and is further support of Petitioners' reasons for the granting of the Writ of Certiorari. The Brief Of Amicus Curiae, although alleging an interest on behalf of class members, states at p. 2, n. 2, that no position will be asserted on behalf of class members as to question 1 set forth in the Petition. The fact that counsel for the plaintiffs and the class which the plaintiffs represent has no position on rights of class members in regard to the issue of opt out under Fed. R. Civ. P. 23, highlights the need for review of the duties of counsel in class actions pursuant to Fed. R. Civ. P. 23. The amicus status, sought by counsel for plaintiffs in this action, is indicative of the urgent need for review by this Court of the rights and duties of parties in class action,

certification only, settlement agreements which are presented to the courts for approval.

CONCLUSION

Based upon the foregoing, the filing of the Brief of the Amicus Curiae should be denied.

Respectfully Submitted,

Barbara B. Hutchinson
Counsel of Record
7907 Powhatan Street
New Carrollton, MD. 20784
Telephone: (301) 577-3387

Theresa L. Watson
110 Michigan Avenue, N. E.
Suite F21
Washington, D. C. 20017
Telephone: (202) 332-1969

DOCKET NO. 98-326

UNITED STATES SUPREME COURT
OCTOBER TERM 1997

WALTER J. THOMAS,
PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY,
RESPONDENT

AFFIDAVIT OF BARBARA B. HUTCHINSON

I, Barbara B. Hutchinson, counsel of record in the above-captioned matter before this Court, swear under penalty of perjury that on August 30, 1998, I mailed, via the United States mail, first class postage attached, the Docketing Statement and appropriate waiver forms supplied by the Office of The Clerk of this Court to the following individuals:

Solicitor General
Of The United States
Room 5614
Department Of Justice
10th St. & Constitution Aves.
Washington, D. C. 20530

Ms. Meredith Manning
Ms. Cynthia Schnedar
Asst. U. S. Attorney
555 Fourth Street, N. W.
Washington, D. C. 20001

Mr. Warren Connelly
Akin, Gump, Strauss,
Hauer & Feld
1333 New Hampshire Avenue,N.W.
Washington, D. C. 20036

Mr. Carl E. Anderson
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH. 44113

Ms. Avis Buchanan
Washington Lawyers' Committee
for Civil Rights & Urban Affairs
1300 Nineteenth Street, N. W.
Washington, D. C. 20036

This 28th day of October, 1998.

Barbara B. Hutchinson

EXHIBIT A

FILED

AUG 25 1998

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER THOMAS, et al.

Plaintiffs,

v.

MADELEINE ALBRIGHT,
Secretary, Department of State

Defendant.

Civil Action 86-2850 (SS)

CONSENT ORDER SEALING THE DEPARTMENT OF STATE'S THIRD REPORT UNDER THE 1996 GLOBAL CONSENT DECREE

The parties hereby stipulate and agree, pursuant to the Court's agreement, that the Department of State's Third Report Under the 1996 Global Consent Decree shall be filed under seal, that counsel for the class may distribute the sealed report to class members, and that class members may not copy the report or disclose its contents to anyone who is not a class member.

Respectfully submitted,

Warren E. Connelly /w/permission mm

WARREN E. CONNELLY, Bar #182345
Akin, Gump, Strauss, Hauer
& Feld, L.L.P.
1333 New Hampshire Ave., N.W., Suite 400
Washington, D.C. 20036
(202) 887-4000

MEREDITH MANNING, Bar # 449063
Assistant United States Attorney
555 Fourth Street, N.W., Room 10-108
Washington, D.C. 20001
202-514-7190

APPROVED AND SO ORDERED

Dated this 11 day of August, 1998

STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE

(N)

357

EXHIBIT B

DOCKET NO. _____
UNITED STATES SUPREME COURT
OCTOBER TERM 1997

WALTER J. THOMAS, ET. AL,
PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY,
U. S. DEPARTMENT OF STATE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioners' Objection To The Amicus Curiae Brief Of The Class Of African-American Foreign Service Officers in the above captioned matter was served upon all parties to this action, including the Solicitor General Of The United States, by depositing a copy in the United States mail, first class postage attached, addressed to:

Solicitor General Of The
United States
Room 5614
Department Of Justice
10th St. & Constitution Aves.
Washington, D. C. 20530

Mr. Warren Connelly
Akin, Gump, Strauss, Hauer &
Feld
1333 New Hampshire Avenue,N.W.
Washington, D. C. 20036

Ms. Avis Buchanan
Washington Lawyers' Committee
for Civil Rights & Urban
Affairs
1300 Nineteenth Street, N. W.
Washington, D. C. 20036

Ms. Meredith Manning
Ms. Cynthia Schnedar
Assistant U. S. Attorney
555 Fourth Street, N. W.
Washington, D. C. 20001

Mr. Carl E. Anderson
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH. 44113

This 29th day of October, 1998.

Barbara B. Hutchinson